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# Future Property Interests in Kentucky (continued)

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## FUTURE PROPERTY INTERESTS IN KENTUCKY\*

### II. REMAINDERS

If a tenant in fee simple granted a term for years or for life, or even an estate in tail, we have seen that the part of the fee undisposed of remained in the grantor and was called a reversion. If he were to grant in the same instrument this remaining interest or reversion, or any part of it, to a third person, this interest created in the third person was called a remainder and not a reversion. To use the illustration given by Williams in his work on Real Property,<sup>1</sup> "If a grant be made by A, a tenant in fee simple, to B for life, and after his decease to C and his heirs, the whole fee simple of A will be disposed of, and C's interest will be termed a remainder expectant on the decease of B.

A remainder, as he further points out, always has its origin in express grant, and "a reversion merely arises incidentally, in consequence of the grant of the particular estate." The former arises from act of the parties and the latter is created by operation of law.

The term "remainder" comes from the Latin verb "*remanere*" and was originally used to signify that the interest remained away from the grantor, did not come back to him upon the termination of the first or particular estate granted, and did not indicate that it remained in him. Whereas in the case of a reversion the land reverted or came back to the grantor at the end of the term granted.<sup>2</sup>

Remainders are either vested or contingent. A vested remainder is a present interest in land the enjoyment of which is postponed until the termination of the prior or particular estate;

\*The first part of this article was published in Vol. XII, Kentucky Law Journal, p. 58.

<sup>1</sup> (21st Ed.) 332, 333.

<sup>2</sup> 2 Pollock and Maitland, History of English Law, 21, 22.

whereas a contingent remainder is merely the possibility of an estate which, as Tiffany says, "exists when what would otherwise be a vested remainder is subject to a condition precedent, or is created in favor of an uncertain person or persons."<sup>3</sup>

According to Williams, a vested remainder "would be an estate in possession, were it not that other estates have a prior claim; and their priority alone postpones, or perhaps may entirely prevent possession being taken by the remainderman. The gift is immediate; but the enjoyment must necessarily depend on the determination of the estates of those who have a prior right to the possession."<sup>4</sup>

The definition most often quoted with approval in the Kentucky decisions is that given by Fearne in his treatise on Contingent Remainders, Vol. 1, p. 216; "The present capacity of taking effect in possession, if the possession were to become vacant, and not the certainty that the possession will become vacant before the estate limited in remainder determines, universally distinguishes a vested remainder from one that is contingent."<sup>5</sup>

This test, as pointed out by Tiffany, is "not entirely accurate, unless we exclude from the possible causes of vacancy of possession the normal expiration of the preceding estate. In the case, for instance, of a devise to A for life with remainder to B and his heirs, provided B survives A, the remainder is contingent although capable, upon a vacancy in possession arising from A's death, of taking effect in possession."<sup>6</sup> The Kentucky Court of Appeals, also refers to this fact in the case of *Williamson v. Williamson*,<sup>7</sup> in these words: "This principle, however general and universal it may be, has no application in a case like this, where the event which renders the possession vacant also resolves the contingency upon which the limitation depends, and makes that certain which was before uncertain." This statement is cited with approval by the court in the carefully writ-

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<sup>3</sup> Real Property (2nd Ed.), 484.

<sup>4</sup> Real Property (21st Ed.), 345.

<sup>5</sup> *Walter v. Crutcher*, 15 B. Mon. 2; *Bowling's Reps. v. Dobyn's Admr.*, 5 Dana 442; *Johnson v. Robertson, et al.*, 45 S. W. 523, 20 Ky. L. R. 135; *Railey v. Milam*, 5 S. W. 367, 9 Ky. L. R. 409; *Sherley, et al. v. Sherley, et al.*, 192 Ky. 122, 232 S. W. 53.

<sup>6</sup> 1 Real Property (2nd Ed.) 494.

<sup>7</sup> 18 B. Monroe 368.

ten opinion in *Johnson v. Jacob*<sup>8</sup> in which case the executors were to hold certain property for the life of testator's son and pay him the rents and profits. After the son's death the proceeds were to be paid to his descendants, if there be any living, if none the property was to be conveyed to his heirs. The court held that the remaindermen, the descendants of the life tenant, took contingent remainders since it was impossible to ascertain what persons would fall within the description until the death of the life-tenant. The death of life tenant here rendered the possession vacant, and also resolved the contingency upon which the limitation depended.

As the court in this case suggested the remainderman must be ascertained or ascertainable in order to have a vested remainder. It does not necessarily follow, however, that because the remainderman is ascertained the estate is vested. The court has sometimes overlooked that fact as in the case of *Mercantile Bank of New York v. Ballard's Assignee*<sup>9</sup> and the case of *Johnson, et al. v. Whitcomb, et al.*<sup>10</sup> In the latter case there was a devise to testator's wife for life, and after her death, the property was to be equally divided among the testator's brothers and sisters "hereinbefore mentioned" or such of them as should be living at the death of the wife. The court held that the brothers and sisters took a vested fee simple estate in remainder, subject to be defeated by their deaths before the life tenant, and cited with approval the decision in *Mercantile Bank of New York v. Ballard's Assignee*. In that case a will provided: "But my son is to have only the use thereof during his life for the maintenance of himself and family, and no part thereof shall be liable for his debts, nor shall he have the power to alienate, etc. After his death or if he die before me, the fee simple of said property shall be conveyed to his children, if he leave any, and their descendants, in the same proportion as if it had descended from him; but if he leave no children, or the descendant of a child, the same shall be held in like manner for the support, use and benefit of my daughter, etc." The court held that the son's children took vested remainders, whether or not they were born when the will

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<sup>8</sup> 11 Bush 646, at page 658.

<sup>9</sup> 83 Ky. 481.

<sup>10</sup> 166 Ky. 673, 178 S. W. 821.

took effect and the fact that their interests might be divested by their deaths before that of the life-tenant did not make the remainders contingent. The court illustrates with the hypothetical case of a devise to A for life, remainder to B, but if B is dead at the termination of the life estate then to C, and says a vested estate is passed to B and a contingent interest to C. It seems clear that B's surviving A is a contingency on which the vesting of any interest in him depends. It is not the case of a devise to A for life, and a remainder to B for life, remainder to C in fee. There it is universally conceded by the authorities that B has a vested estate although he will not enjoy the same unless he survives A. In the case put by the court if A should purport to convey a fee simple to a stranger, before any change was made by statute relative to the destructibility of contingent remainders, the result would be a tortious fee in the stranger and A's estate would be forfeited. As the contingency upon which the vesting of B's interest depended, namely, his surviving A had not occurred, B would not be entitled to enter and his contingent interest under the common law rules would be destroyed.

The error of holding that if the remainderman is ascertained the interest is necessarily a vested one is probably due to a statement of Chancellor Kent to the effect that the definition of a vested remainder in the New York Statute "appears to be accurately and fully expressed."<sup>11</sup> The court in *Forsythe v. Lansing's Exrs., &c.*<sup>12</sup> refers to this passage in Kent's Commentaries with approval. To quote from the opinion: "Kent (4 Comm. section 202) says: 'An estate is vested when there is an immediate right of present enjoyment, or a present, fixed right of future enjoyment.' The definition of a 'vested remainder' in the New York Revised Statutes appears to be accurately and fully expressed. It is, viz.: 'When there is a person in being, who would have an immediate right of possession of the lands, upon the ceasing of an immediate precedent estate.' " In *Forsythe v. Lansing's Ex'rs* there was a devise of the profits of a farm to testatrix's husband and to one of her sons, W, during the life of the husband, and after the husband's death one-half the farm

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<sup>11</sup> 4 Kent, Comm. 202.

<sup>12</sup> 109 Ky. 518, 519.

to W and one-half to two other sons; provided if either son should die childless his interest to go to the other two and if two should die childless then to the survivor. It was held that each took a vested interest subject to being defeated and that the three took a fee simple and could pass it by a joint deed. This is a very different proposition from that put in the hypothetical case by the court in *Mercantile Bank of New York v. Ballard's Assignee*.

Wherever there is a devise to A for life and then remainder to the heirs of B, a living person, the remainder is clearly contingent as the remaindermen are unascertained. Upon the death of B they become certain and the remainder vests. The cases also make it equally clear that a gift to A for life and remainder to his heirs in fee is also contingent, for a living person can have no heirs, as it is expressed in old cases, *Nemo est haeres viventis*. To use the words of the court in the decision of *Williamson, etc. v. Williamson, etc.*,<sup>13</sup> "The word heir, in its strict technical sense, denotes the person on whom, at the ancestor's decease, the law casts inheritance. No person can properly sustain the character of heir in the lifetime of the ancestor. (2 Jar. on Wills, side p, 13.) Wherefore a limitation to the heirs of a person in existence (if it have the other qualities of a remainder), must be a contingent remainder."<sup>14</sup> Where the heirs named as remaindermen are the heirs of the testator the interests are vested remainders since the will speaks from the time of the testator's death and means the heirs living at that time. Such was the holding in *Weil v. King, et al.*<sup>15</sup> A similar result was also reached in *Hunt v. Phillips, et al.*,<sup>16</sup> and *Campbell, et al v. Hinton*,<sup>17</sup> et al.

A gift to A for life and after his death to his children, living at testator's death, however, creates a vested remainder.<sup>18</sup> In the case of *Turner v. Patterson, et al.*<sup>19</sup> there was a gift to testator's daughter and her children and the court held the

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<sup>13</sup> 18 B. Mon. 329.

<sup>14</sup> See also *Runyon v. Hatfield*, 154 Ky. 171; *Williamson v. Maynard*, 162 Ky. 726; *Weatherford v. Boulware*, 102 Ky. 466.

<sup>15</sup> 104 S. W. 380, 31 Ky. L. R. 1010.

<sup>16</sup> 105 S. W. 445, 32 Ky. L. R. 257.

<sup>17</sup> 150 Ky. 546.

<sup>18</sup> *Coots v. Yewell*, 95 Ky. 367, 25 S. W. 597.

<sup>19</sup> 5 Dana 292.

estate vested in the children living at testator's death subject to open and vest in each after-born child as it came into being. The word children here was taken as a term of purchase and not of limitation and the mother and children took a vested interest as tenants in common. In *Johnson v. Robertson, et al.*<sup>20</sup> an estate was deeded to a wife for life or so long as she remained unmarried, with a remainder to the grantor's children and it was held that a vested remainder was created in the children, which was not divested by the death of the life tenant before that of the grantor. Remainders to children were held vested in *Roach v. Dance, et al.*,<sup>21</sup> *Pedigo's Ex'r, et al. v. Botts, et al.*,<sup>22</sup> and *Young v. Monroe, et al.*<sup>23</sup> Where, however, the devise was to children living at death of the life tenant it was correctly held in *McKee v. McKee's Ex'r*,<sup>24</sup> *White's Trustee v. White, &c.*,<sup>25</sup> *Loab v. Struck, et al.*,<sup>26</sup> *Whalen, et al. v. Kellner, et al.*,<sup>27</sup> *Froman v. Froman*,<sup>28</sup> *Craig v. Williams*,<sup>29</sup> and *Nunnelly's Guardian, et al. v. Nunnelly, et al.*,<sup>30</sup> that the remainders were contingent. They would also be contingent where the children were unborn at the death of the testator.<sup>31</sup> Such an interest would vest upon the birth of children.<sup>32</sup> A devise of a remainder to a posthumous child would be vested, it would seem, under statutory provisions. Section 2079 provides that "A posthumous child shall be considered a devisee under law of contribution, and entitled to all the rights, and liable to all his responsibilities." Section 2350 also provides that such a child shall take the estate "in the same manner as if he or she had been born in the lifetime of the parent, notwithstanding no estate shall have been conveyed to support the remainder after the death of the parent."

It is a well settled rule as to remainders that the law favors

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<sup>20</sup> 45 S. W. 523, 20 Ky. L. R. 135.

<sup>21</sup> 80 S. W. 1097, 26 Ky. L. R. 157.

<sup>22</sup> 89 S. W. 164, 28 Ky. L. R. 196.

<sup>23</sup> 199 Ky. 603.

<sup>24</sup> 82 S. W. 451, 26 Ky. L. R. 736.

<sup>25</sup> 86 Ky. 602.

<sup>26</sup> 42 S. W. 401, 19 Ky. L. R. 935.

<sup>27</sup> 104 S. W. 1018, 31 Ky. L. R. 1285.

<sup>28</sup> 175 Ky. 536, 194 S. W. 809.

<sup>29</sup> 179 Ky. 329, 200 S. W. 481.

<sup>30</sup> 180 Ky. 131, 201 S. W. 976.

<sup>31</sup> *Lepper v. Lee*, 92 Ky. 161, 7 S. W. 146.

<sup>32</sup> *Clare, et al. v. Nickols, et al.*, 199 Ky. 581.

construing them as vested rather than as contingent wherever possible. In *Pearcy, &c. v. Greenwell, &c.*<sup>33</sup> the court said, "The law favors vested estates, and will not construe them to be contingent unless the intention of the testator requires such construction." In that case land was given upon condition the devisees pay certain sums to persons named. This provision was held not a condition precedent to title vesting. In *Washer's Exor. v. Washer's Exors.*<sup>34</sup> the court construed words of survivorship as meaning death before the testator and held the estate vested rather than contingent. Again in *Grubb's Ex'or., et al.*<sup>35</sup> land devised to testatrix's son was regarded as a vested remainder notwithstanding a provision that he care for and maintain his parents during their lives. This created a condition subsequent. In *Moore's Adm'r v. Sleet, &c.*<sup>36</sup> a devise was made to a wife for life, remainder to a nephew, providing that if he should die "before he come into possession or before he arrives at twenty-one years of age" the estate should go over. The court went so far as to hold the remainder vested upon the nephew's becoming twenty-one as it was clear, the court said, that or was to be read as *and*.

Under the common law a limitation to A for life, with a remainder to his heirs or to the heirs of his body, a fee-simple or an estate tail, according to whichever limitation was used, was created in A. This principle was known as the Rule in Shelley's case. The heirs of A in such a case were said to take by descent under A and not by purchase. It was necessary that both the particular estate in the ancestor and the remainder in his heirs should both be created by the same instrument. The Court of Appeals, however, early held that the rule in Shelley's case has no application to conditions in this country and is not in force in Kentucky.<sup>37</sup>

Of course where a remainder is given to vest upon the happening of some event that may occur before the termination of

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<sup>33</sup> 80 Ky. 616.

<sup>34</sup> 143 Ky. 643.

<sup>35</sup> 190 Ky. 258, 227 S. W. 272.

<sup>36</sup> 113 Ky. 600, 68 S. W. 643.

<sup>37</sup> *Turman v. White's Heirs*, 14 B. Mon. 450; *Williams, etc. v. Williams, etc.*, 18 B. Mon. 329; *Turner v. Patterson, et al.*, 5 Dana 292; *Alexander, &c. v. De Kermel and Wife*, 5 Ky. L. R. 382. See Kentucky Statutes, Section 2345.



the prior, or particular estate as it is called, upon the happening of such event the estate becomes vested. Thus in *Hunt v. Phillips, et al.*<sup>38</sup> where there was a devise to A and B for their lives with remainder to M and her heirs, upon the death of M in the lifetime of the life-tenants, the remainder in M's heirs, which before was contingent, was held to vest.

In the case of a contingent remainder in fee simple created by a form of conveyancing under the Statute of Uses or by a devise the question naturally arises as to where the fee is until the remainder vests. Chancellor Kent took the position that in such a case the fee was in abeyance until the contingency occurred which should operate to vest it in the remainderman, and the grantor in the meantime had only a possibility of reverter.<sup>39</sup> This view was taken by the court in *Bohon, &c. v. Bohon, &c.*<sup>40</sup> The court said: "That an estate in fee may be made to pass out of the grantor so as to remain in abeyance, in the clouds, in no person, pending the existence of the particular estate, seems to be well settled, notwithstanding the able argument of Mr. Fearne to the contrary." The better view, which is supported by the great weight of authority, is that the title remains in the grantor until the contingency happens, or in the case of a devise, in his heirs, or it might be, as Tiffany suggests, in a special devisee,<sup>41</sup> and this view was taken later by the Court of Appeals in *Coots v. Yewell, &c.*<sup>42</sup> In this case no reference is made to the case of *Bohon v. Bohon*. Both cases are cited by the court in *Baxter v. Bryan*<sup>43</sup> and the latter decision is followed. The statement from Fearne is quoted with approval: "Where a remainder of inheritance is limited in contingency by way of use or devise, the inheritance in the meantime, if not otherwise disposed of, remains in the grantor and his heirs or in the heirs of the testator until the contingency happens to take it out of them."<sup>44</sup> The same question arose in the case of *Newton, et al. v. Southern Baptist Theological Seminary*,<sup>45</sup> and the court said: "There

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<sup>38</sup> 105 S. W. 445, 32 Ky. L. R. 257.

<sup>39</sup> 4 Kent Comm. 257.

<sup>40</sup> 78 Ky. 410.

<sup>41</sup> Real Property (2nd Ed.), Section 141.

<sup>42</sup> 95 Ky. 367, 26 S. W. 179.

<sup>43</sup> 94 S. W. 633, 16 Ky. L. R. 2.

<sup>44</sup> Fearne on Remainders, p. 351.

<sup>45</sup> 115 Ky. 414, 74 S. W. 180.

is a technical rule which recognizes a fee in abeyance, but that state of abeyance was always odious, and never admitted, but from necessity. Kent's Commentaries, vol. 4, p. 259. Such necessity does not exist in this case. The title was not in abeyance, but upon the death of the testator vested in his only child, who could only have been deprived of it by remainder becoming effective which was attempted to be placed in the Baptist Male School, which failed." While none of these three later cases purports to overrule *Bohon v. Bohon*, the language of the court is such as to lead one to believe in effect it is overruled.

Perhaps one of the most striking characteristics of a contingent remainder under the old common law rule was its destructibility. It could be destroyed by the termination of the particular estate before the happening of the contingency upon which the remainder depended. This principle is well illustrated in a fairly recent Illinois case, *Bond v. Moore*,<sup>46</sup> where there was a devise "to my son for life, should he die without issue, then the estate shall go to my nearest relatives." The testatrix meant to provide for the son's children but forgot to insert a provision in their favor. The son had two daughters. He made a conveyance in fee and thereby worked a forfeiture of his life estate and the destruction of the contingent remainder. As the reversion descended to him as heir at law, upon a reconveyance to him, he held free and clear of the remainder. As this doctrine has little reason for its existence under modern conditions and has often in the past been made use of by unscrupulous holders of particular estates to defraud contingent remaindermen from realizing upon their interests, legislation has been passed in England and most of our states rendering contingent remainders non-destructible for want of a particular estate to support them. Section 2346 of the Kentucky Statutes provides that "a contingent remainder shall, in no case, fail for want of a particular estate to support it" and section 2347 enacts that "the alienation of a particular estate on which a remainder depends, or the union of such estate with the inheritance by purchase or descent, shall not operate by merger or otherwise to defeat, impair or affect such remainder."

Suppose, however, that the particular estate is void or that

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<sup>46</sup> 1908, 236 Ill. 576, 86 N. E. 386, 19 L. R. A. (N. S.) 540.

the life tenant waives the estate in favor of some provision under the statutes or that the remainder is to take effect upon the death of the widow who is given an estate for life or until she marries, and she marries; in such cases are the remaindermen's interests moved forward or accelerated? Under the earlier common law rules a distinction was made where the remainder was created by deed and where by will. This earlier view is well set out in the court's opinion in *Timberlake v. Parish's Ex'or.*<sup>47</sup> in the words of the court: "The fact that the particular estate was not accepted, and therefore did not take effect, did not, *per se*, destroy the remainder, as it might have done, had the document of title been a deed instead of a will; for, not only does the intention generally prevail in a will, but an executory interest may be created by it, without the intervention or support of an intermediate estate. And therefore, as every distinct legacy or devise, without any expressed motive or object, will be deemed, in the absence of any intimation to the contrary, in the will, a bounty to each several devisee or legatee, the non-acceptance or forfeiture by one, can not destroy the separate right of another beneficiary, but would have the effect only of hastening the enjoyment by the latter, when his vested interest was made—not to depend upon the former, but only to succeed it." At the present time it is immaterial whether the interest is created by deed or will<sup>48</sup> and it is clearly settled that where land is given to A for life with remainder to B, if the life estate is terminated in any way as by the renunciation of a will by a widow the remainder takes effect at once;<sup>49</sup> that is where the remainder is vested. In the case of a contingent remainder the general rule is that there is no acceleration where the particular estate is void or renounced by the life tenant. Such was the decision in *Augustus, etc. v. Seabolt, etc.*<sup>50</sup> where there was a devise to testator's wife for life, and after her death, to be equally divided among the children of testator's brothers, or such of them as should be living at the wife's death. There was a provision that if she remarried she should not hold the land. It was held that

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<sup>47</sup> 5 Dana 347.

<sup>48</sup> Kentucky Statutes, Section 2341.

<sup>49</sup> *O'Rear v. Bogie*, 147 Ky. 668; *Faulkner v. Tucker, et al.*, 83 S. W. 579.

<sup>50</sup> 3 Metcf. 155.

upon her re-marriage the heirs at law took until the wife's death when the contingent remainderman would take. In *O'Rear v. Bogie*<sup>51</sup> the court said: "While there are not a few cases holding that the renunciation of a will by a widow will not precipitate a contingent remainder, they recognize the rule that this will not be so held where to do so will defeat the testator's intention apparent on the whole will, and we are of opinion that this case falls within the exception." Tiffany in referring to this case says, that a contingent remainder can accelerate if such is the intention, would seem to be impossible; and that in this case the remainder appears actually to have been a vested one.<sup>52</sup> In view of the construction given certain phrases in the will, this observation seems correct. In *Keeton, et al. v. Tipton, et al.*<sup>53</sup> the life tenant after enjoying the estate for several years came into court and renounced his interest and joined with part of the contingent remaindermen in asking for a sale and a division of the proceeds. It was contended that his renunciation accelerated the remainders. The court refused to take this view and said that at most his renunciation operated as a conveyance of the life interest and not as a destruction of it.

The principle that where the remainderman acquires the life estate there will be a merger of the two and the life estate is extinguished, was recognized in *Larmon v. Larmon, et al.*<sup>54</sup> and *Hunt v. Phillips, et al.*<sup>55</sup> In the former case the court quotes the following statement of the doctrine from Blackstone: "Whenever a greater estate and a less coincide and meet in one and the same person, without any intermediate estate, the less is immediately annihilated; or, in the law phrase, it is said to be merged, that is, sunk or drowned in the greater. Thus, if there be a tenant for years, and the reversion in fee simple descends to or is purchased by him, the term of years is merged in the inheritance, and shall never exist any more."

The next question that naturally suggests itself is whether a remainder is assignable. A vested remainder, being an estate

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<sup>51</sup> 157 Ky. 670, 163 S. W. 1107.

<sup>52</sup> 1 Real Property, note 97, p. 524.

<sup>53</sup> 184 Ky. 704, 212 S. W. 909.

<sup>54</sup> 173 Ky. 704, 212 S. W. 909.

<sup>55</sup> 105 S. W. 445, 32 Ky. L. R. 257.

and not a mere possibility of an estate in the future, was assignable under the old common law rules. It could be conveyed by deed<sup>56</sup> or passed upon the death of the remainderman to his heirs or to his vendee or devisee.<sup>57</sup> A contingent remainder, being merely a possibility of a future estate, was not assignable at common law. It might be released, and where one having a contingent remainder, purported to convey his interest and the estate later vested in him the conveyance might take effect under the doctrine of deed by estoppel or might be enforced in equity.<sup>58</sup> The common law rule as to the assignability of contingent remainders has been changed by statute in this state and today they are held to pass either by deed or will under section 2341,<sup>59</sup> and a contingent interest may be subjected to claims of judgment creditors.<sup>60</sup> Of course the assignee or devisee of such an interest takes nothing if the contingency does not happen so that the estate will vest. The head note to the recent case of *Kendrick v. Scott*<sup>61</sup> states that a contingent remainderman has no alienable interest during the life of the life tenant. Of course it is not intended to hold that he has not an alienable interest within the meaning of section 2341. The facts of the case do not seem to support such a view nor does the opinion of the court. The contingent remainderman who first purported to convey his interest did not survive the life tenant, his survival being the contingency on which his interest depended, so that nothing passed under the deed. One of the other contingent remaindermen gave a quitclaim deed purporting to convey any interest he might have in the land which was conveyed under the deed by the first remainderman to convey. The court correctly held that nothing passed under either deed and that the doctrine of estoppel did not apply as the latter deed was a quitclaim deed.

Interesting questions arise as to the respective rights and obligations regarding the property during the continuance of the

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<sup>56</sup> *Johnson v. Jacobs*, 11 Bush 646.

<sup>57</sup> *Williams v. Maynard*, 162 Ky. 726; *Park v. McCombs*, 146 Ky. 327, 142 S. W. 401.

<sup>58</sup> *Grayson v. Tyler's Adm., &c.*, 80 Ky. 358.

<sup>59</sup> *White's Trustee v. White, &c.*, 86 Ky. 602; *Bank of Taylorsville, et al. v. Vandyke, et al.*, 159 Ky. 201, 166 S. W. 1024.; *Fulton v. Teager, et al.*, 183 Ky. 381, 209 S. W. 535.

<sup>60</sup> *Jacob v. Howard, et al.*, 22 S. W. 332.

<sup>61</sup> 200 Ky. 202.

particular estate. In *Lindgenberger v. Cornell*<sup>62</sup> the life tenant who was required to remove an encumbrance secured by a lien on the property to prevent its sale, was given a lien upon the entire property for recoupment. She was not, however, allowed to charge the remainderman with part of costs of repairs made on the property. The court's statement on this point was: "It would seem that a life tenant receiving a house which was in need of ordinary repairs, it would be his duty to put it in repair, and, at the least, having done so, it would be presumed to have been done for his own comfort and convenience, and would not be made a charge upon the remaindermen personally or against their interest in the property." To the same effect is the decision in *Larmon v. Larmon, et al.*<sup>63</sup>

As pointed out in *Foster v. Foster, et al.*,<sup>64</sup> "until the death of the life tenant the remainderman has no right to control or use the property nor to reduce it to possession. Where a remainderman, as in this case, placed improvements on the property, knowing his rights and the rights of the other remaindermen, he could not remove them nor recover the value when he vacated.

Taxes are a lien on the property and where, as in *Davies' Ex'r v. City of Louisville*<sup>65</sup> the tax was assessed against the remainderman when it should have been assessed against the life tenant and the life tenant died, thereby terminating the life estate, the court held that property being owned by the life tenant and the remainderman the taxes were a lien upon the interest of each and as the life tenant had not paid, the remainderman must pay to relieve the property.

As to a remainderman's right to sue for injury to the property before coming into possession, the old English statutes provided that only those who had a reversion or remainder in fee or in tail immediately following the interest of the one committing the waste could bring suit. Section 2328 of the Kentucky Statutes makes a life tenant liable for waste and section 2329 provides that "the action may be maintained by one who has the remainder or reversion in fee-simple after an intervening estate for life or years, and also by one who has a remainder or rever-

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<sup>62</sup> 190 Ky. 844.

<sup>63</sup> 173 Ky. 477.

<sup>64</sup> 189 Ky. 370, 225 S. W. 48.

<sup>65</sup> 171 Ky. 663.

sion for life or years only, and each of them shall recover such damages as it shall appear that he has suffered by the waste complained of."

This statute does not allow contingent remaindermen to maintain an action for waste.<sup>66</sup> Equitable relief, nevertheless, may be granted a contingent remainderman as well as a vested remainderman when necessary to protect his interests,<sup>67</sup> and where the life tenant attempted to repudiate the title of the remaindermen an action was allowed the latter to protect their rights and remove a cloud on their title in *Frey v. Clark*.<sup>67</sup>

Finally the question as to when actions by remaindermen will be barred remains for consideration. As a general rule the statute of limitations does not run against a remainderman until the particular estate is determined.<sup>68</sup> Where the action is available to the remainderman, the statute begins to run at once. In *Fisher v. Haney* the court pointed out that in the case of voluntary waste on the part of the life tenant since the statute gives the remainderman an immediate right to sue, he must bring his action within the five years set by the statute of limitations but that in the case of permissive waste the cause of action did not finally accrue until the death of the life tenant.

### III. EXECUTORY DEVISES

A devise of a freehold estate to take effect in the future, that is at a time subsequent to the testator's death, either with or without a preceding limitation to another, which estate could not take effect as a contingent remainder, was known as an "executory devise."<sup>69</sup> An example of such an executory limitation would be a devise to A of an estate to take effect upon his return from Rome. In *Fulton v. Teager, et al.*<sup>70</sup> where there was a devise to a wife for life, remainder to testator's son and niece and in the event of the death of the niece without child prior to the death of the wife, then her moiety to the son, the court

<sup>66</sup> *Fisher's Ex'r. v. Haney, et al.*, 180 Ky. 257; *Taylor v. Harvey, et al.*, 100 S. W. 253, 30 Ky. L. R. 1045.

<sup>67</sup> *Fisher v. Haney, supra*; *Frey v. Clark*, 176 Ky. 661.

<sup>68</sup> *Phillips v. Williamson*, 184 Ky. 396; *Bates v. Adams*, 182 Ky. 100; *Jackson v. Claypool*, 179 Ky. 662.

<sup>69</sup> 1 Tiffany, 552.

<sup>70</sup> 183 Ky. 381, 209 S. W. 535.

in considering the son's interest in this moiety said: "His interest, however, is not a contingent remainder. A remainder can not be limited upon a fee, because it would be the creation of an estate in derogation of the fee, and this ancient doctrine of the common law yet prevails, although the fee should be a qualified one, or a conditional or base fee, as is a defeasible fee. The interest devised to J. Stealey Teager, (the son), in the portion of the property, which was devised to Emma Louise Stealey, in remainder, has all the elements of a contingent remainder, except that it is a contingent estate limited upon the defeasible fee of Emma Louise Stealey, which by the common law, is an impossibility. It is, however, an interest in land, and is of the character of estates, which have grown up under the statute of uses and the statute of wills, and now well recognized, and which, if created by a deed, would be denominated an estate upon a conditional limitation, and when created by will, as was this one, is called an executory devise."

As held in the case of *Nunnally v. White's Ex'rs*<sup>71</sup> an executory devise could not be destroyed by the holder of a prior estate as was possible in the case of a contingent remainder. An executory devise was indestructible. Neither the conveyance of the property by the holder of the defeasible fee nor the possession of it by the purchaser claiming as his own, no matter how long continued, before the happening of the contingency upon which the executory devise was to take effect, the court said, could defeat the rights of the executory devisees.

Originally, as the name suggests, executory devises could be created by will only. Section 2341 of the Kentucky Statutes has changed this. This section provided that "any estate may be made to commence in future by deed, in like manner as by will, and any estate which would be good as an executory devise or bequest, shall be good if created by deed."

Where there is a gift to A and then an executory devise over to B upon a certain event happening, A is said to have a defeasible fee, a fee simple—subject to be defeated upon the event happening.<sup>72</sup> In case the executory limitation is invalid, the estate of A continues. The occurrence of the event specified does

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<sup>71</sup> 3 Metc. 584.

<sup>72</sup> *Simpson v. Adams*, 127 Ky. 790.



not mark the limit of A's estate but rather gives B the right to defeat it. If for some reason B's right does not mature, A's estate continues.

In conclusion it may be said that statutory enactments in Kentucky have practically abolished the marked differences that existed at common law between vested remainders, contingent remainders, and executory devises. Since a contingent remainder is now indestructible for reason of there being no particular estate to support it and since it is now held to be an alienable interest in land, it would seem to make practically no difference whether a remainder were held to be a vested "defeasible" fee or a contingent remainder in fee. An assignee in either case would acquire nothing if the event upon which the interest depended should not happen. Furthermore it is now possible to create by deed an executory limitation which formerly could be created by will only.

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(To be Continued)